RECORD
AND
BRIEFS

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Nos. 16-285, 16-300 & 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner*,

v.

JACOB LEWIS, *Respondent*.

ERNST & YOUNG LLP, ET AL., *Petitioners*,

v.

STEPHEN MORRIS ET AL., *Respondents*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MURPHY OIL USA, INC., ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENTS IN NO. 16-307

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in these cases.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, the National Labor Relations Board ("the Board" or "NLRB") held that class and collective actions are "other concerted activities" protected under Section 7 of the National Labor Relations Act ("NLRA"); that agreements between employers and

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties except the NLRB have filed blanket consents to the filing of *amicus curiae* briefs. The written consent of the NLRB to this filing has been filed concurrently with the brief.

employees to arbitrate disputes on an individual basis therefore constitute an "unfair labor practice" under Section 8 of the NLRA; and that the FAA does not preclude the Board from declaring such agreements unenforceable. *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, enf. denied in pertinent part *sub nom. D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013). These three consolidated cases require the Court to review the Board's conclusion that the otherwise-applicable protections of the FAA are displaced by the NLRA.

This Court has long recognized the general principle that federal statutes should not be interpreted to impliedly repeal or otherwise conflict with the commands of other federal laws. *Morton* v. *Mancari*, 417 U.S. 535, 545-551 (1974); see also *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264 (2007); *United States* v. *Fausto*, 484 U.S. 439 (1988).

The Court has applied that principle frequently in the context of the FAA, addressing alleged conflicts between that statute and six different federal laws. As a result, the Court has distilled the general governing principles into a more particularized test applicable when a federal statute is claimed to conflict with the FAA. That test asks whether the other federal statute contains a "contrary congressional command" overriding the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012). There is no such contrary congressional command here. Indeed, the NLRB's contorted effort to avoid this test underscores the flaws in its position.

The statute relied on by the NLRB as the basis for the *D.R. Horton* rule—Section 7 of the NLRA—

does not contain a "contrary congressional command" that overrides the FAA. As this Court has made clear (most recently in *CompuCredit*), a statute must expressly mention arbitration in order to displace the FAA, and the NLRA says nothing about arbitration. Indeed, Section 7 does not mention class actions or joint litigation—and its general reference to "other concerted activities" is at the very most ambiguous about whether such activities are protected, which is insufficient to overcome the FAA.

The two other exceptions to the FAA's mandate also offer no support for the *D.R. Horton* rule. The first—the so-called "effective vindication" exception—applies only when an arbitration agreement bars a claimant from invoking a federal cause of action. There is no such prohibition here. The NLRB argues that arbitration agreements abridge employees' statutory right to pursue class or collective actions, but that argument rests on a conceptual flaw and legal error: class and collective actions are a *procedural* mechanism, not a substantive right, and in any event, the NLRA does not confer any "right" to engage in class or collective actions.

The final exception to the FAA—its "savings clause"—is also inapposite. The savings clause saves *state* contract laws of general applicability from FAA preemption; it does not apply to *federal* laws, which are subject to this Court's "contrary congressional command" test. Moreover, even if the savings clause applied to federal laws, the *D.R. Horton* rule would not implicate the clause's protections. This Court squarely held in *Concepcion* that the savings clause does not "save" rules prohibiting waivers of class procedures, because such rules interfere with the bilateral nature of arbitration and thus "create[] a

scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

Nor are policy objections against arbitration a valid basis for overriding the FAA. By enacting the statute, Congress adopted a federal policy favoring arbitration, which cannot be set aside by courts. Congress's judgment, moreover, was and is sound: protecting the enforceability of arbitration agreements benefits employers and employees alike. Most workplace grievances are individualized and therefore could not be pursued as part of a class or collective action. Indeed, without individual arbitration, most of those claims could not be pursued at all. The best empirical data available show that employees fare at least as well in arbitration as in litigation, if not better; and that litigation in court is frequently too expensive to serve as a realistic option for employees seeking to vindicate their rights.

ARGUMENT

I. THE FAA BARS THE *D.R. HORTON* RULE.

These consolidated cases require the Court to address the interaction of two federal statutes—the FAA and the NLRA.

The FAA. Enacted in 1925, the FAA was intended to "'reverse the longstanding judicial hostility to arbitration agreements'" (*EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002)) and substitute "an 'emphatic federal policy in favor of arbitral dispute resolution'" (*KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985))).

The statute provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In the absence of such generally applicable grounds, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (emphasis, quotation marks, brackets, and citations omitted).

The FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Id.* at 2308 (quotation marks omitted); see also *Imburgia*, 136 S. Ct. at 471 (reiterating that state courts must enforce arbitration agreements containing class waivers); *Concepcion*, 563 U.S. at 340, 352. Because the arbitration agreements in these cases all require disputes to be arbitrated on an individual basis and prohibit class proceedings, they fall squarely within the FAA's protection against invalidation.

The NLRA. The NLRA was enacted in 1935 to "encourag[e] the practice and procedure of collective bargaining" and "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

Section 7 of the Act affords employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through repre-

sentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157. Section 8, in turn, makes it unlawful for employers to "interfere with, restrain, or coerce employees in the exercise of" these rights. *Id.* § 158(a)(1).

In *D.R. Horton*, the Board held that a class or collective lawsuit in court is a form of "concerted activit[y]" under Section 7 and that agreements to arbitrate disputes on an individual basis infringe upon that right in violation of Section 8. It further concluded that the FAA did not preclude invalidation of such arbitration agreements, notwithstanding this Court's holdings in *Concepcion* and *Italian Colors*.

Because the FAA mandates that arbitration agreements be enforced according to their terms—including terms requiring bilateral arbitration—the Board's holding in *D.R. Horton* conflicts with the FAA and must give way unless an exception to the FAA applies. None does.

A. The NLRA Does Not Contain A "Contrary Congressional Command" Overriding The FAA.

When, as here, a party maintains that another federal statute provides grounds for invalidating an arbitration agreement, this Court has asked whether the other federal statute contains a "contrary congressional command" overriding the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit*, 565 U.S. at 98.

The Court explained more than thirty years ago that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agree-

ments to arbitrate will be held unenforceable." *Mitsubishi Motors*, 473 U.S. at 627. And it has hewed to that approach ever since.

The NLRB and other parties seeking to invalidate employment-arbitration agreements have for the most part sought to avoid the "contrary congressional command" standard—presumably because they recognize that they cannot satisfy it. But "in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement," this Court "begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." No. 16-300 Pet. App. 29a (Ikuta, J., dissenting).

There is no such congressional command in the NLRA.

1. The "contrary congressional command" standard.

The heavy burden on the party seeking to invoke the "contrary congressional command" exception is clear from this Court's consistent rejections of attempts to invoke it. The Court has assessed six federal statutes and found that not one contained the "contrary congressional command" needed to displace the Federal Arbitration Act. *Italian Colors*, 133 S. Ct. at 2309 (Sherman Act); *CompuCredit*, 565 U.S. at 104 (Credit Repair Organizations Act); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (Age Discrimination in Employment Act); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (Securities Act of 1933, overruling *Wilko* v. *Swan*, 346 U.S. 427 (1953)); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 238, 242 (1987) (Securities Act of 1934 and RICO); *Mitsubishi*

Motors, 473 U.S. at 640 (Sherman Act); see also *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 89-90 (2000) (undisputed that Truth in Lending Act claims are arbitrable).

That consistency is not surprising. "The burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227. And that intent must be explicitly expressed: If a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *CompuCredit*, 565 U.S. at 104.

This standard requires Congress to speak with "clarity," by precluding arbitration, or an aspect of arbitration protected by the FAA, expressly in the text of the statute if it wishes to override the FAA. *Id.* at 103. "[O]btuse" legislative language is insufficient to support the conclusion that Congress intended to displace the FAA's enforcement mandate. *Ibid.*

The *CompuCredit* Court pointed to other statutory provisions as examples of the requisite clarity—each expressly limited the enforceability of arbitration agreements in specified circumstances. *Id.* at 103-04 (for example, 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.")).

Finally, because the Court "resolve[s] doubts in favor of arbitration," if the parties' arguments are "in equipoise," this Court's "precedents require" that the agreement to arbitrate be enforced. *Id.* at 109

(Sotomayor, J., joined by Kagan, J., concurring) (citing *Gilmer*, 500 U.S. at 26).

To constitute a "contrary congressional command" sufficient to override the FAA, therefore, the NLRA must contain clearer language than the statutes involved in all of this Court's prior cases. What is required is statutory language clearly displacing the FAA's protection of arbitration agreements generally or bilateral arbitration in particular. The NLRA does not come close to satisfying that standard.

2. The NLRA's text contains no indication that Congress displaced the FAA's protection of arbitration agreements.

The text of the NLRA does not mention arbitration, class actions, or even bringing actions in court. That fact alone is dispositive of the issue.

Because the statute is "silent" on these matters, "the FAA requires [an] arbitration agreement to be enforced according to its terms." *CompuCredit*, 565 U.S. at 104; see also *D.R. Horton* v. *NLRB*, 737 F.3d at 361 (noting that Congress "did not discuss the right to file class or consolidated claims against employers" in the NLRA); *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 141 (Cal. 2014) (Liu, J.) ("[N]either the NLRA's text nor its legislative history contains a congressional command prohibiting [class] waivers.").

Even a mention in the statute of class actions or concerted litigation would not be sufficient. The Credit Repair Organizations Act expressly allows plaintiffs to bring actions in court, expressly specifies standards governing class actions, and prohibits the

waiver of "any right * * * under this sub-chapter." 15 U.S.C. § 1679f(a). This Court nonetheless held that these provisions failed to "do the heavy lifting" necessary to displace the FAA. *CompuCredit*, 565 U.S. at 100.

The Age Discrimination in Employment Act ("ADEA") goes even further, expressly providing for collective actions (29 U.S.C. § 626(b))—yet the Court held that this was likewise insufficient to override the FAA. *Gilmer*, 500 U.S. at 32; see also *Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions.").[2]

The Board has suggested that Section 7's reference to "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" provides the "clarity" required to override the FAA. No. 16-307 Pet. App. 45a-46a. But the "contrary congressional command" standard requires, at a minimum, statutory text that clearly and unambiguously protects class-action lawsuits.

To begin with, contrary to the Board's assertion, this Court has never even addressed whether Section 7 applies to lawsuits in court.[3] And it has never ap-

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[2] Federal courts of appeals have uniformly held that there is no congressional command to preclude arbitration of claims under the Fair Labor Standards Act, which contains precisely the same authorization of opt-in class actions as the ADEA. *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1330-37 (11th Cir. 2014) (joining Second, Fifth, and Eighth Circuits).

[3] In holding that class actions fall within the "other concerted activities" catch-all, the Board relied heavily on *Eastex, Inc.* v.

plied the "contrary congressional command" test to the NLRA. The statutory text falls far short of what is required to displace the protection for arbitration agreements that Congress enacted in the FAA.

First, Section 7 does not mention class actions; indeed, it does not mention litigation. Just as the *CompuCredit* Court indicated that an express reference to limiting the enforceability of arbitration agreements would be needed to make a federal claim nonarbitrable (see pages 9-10, *supra*), displacement of the FAA's protection of bilateral arbitration requires an express reference to class actions, or at least to joint litigation. But there is no such reference in the NLRA.

Moreover, the vague text on which the Board relies points *away from* the inclusion of class-action lawsuits. The phrase "other concerted activities" follows a list of *non*-litigation conduct: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing."

"[W]here general words follow specific words in a statutory enumeration, the general words are con-

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NLRB, 437 U.S. 556 (1978). But that case involved the distribution of newsletters, not litigation. This Court stated only that "*it has been held that* the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"—citing lower court rulings in support of that proposition. *Id.* at 565-66 & n.15 (emphasis added). Moreover, the Court expressly disclaimed any determination as to whether Section 7 encompasses litigation—by following its citation of those lower-court decisions with the statement that "we do not address here the question of what may constitute 'concerted' activities in this context." *Id.* at 566 n.15.

strued to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quotation marks omitted). Under this "'familiar'" canon of statutory construction, "'catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.'" *Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014) (brackets omitted) (quoting *Fed. Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)). Both the indeterminate nature of the phrase "other concerted activities" and this principle of interpretation weigh heavily *against* the Board's contention that the term "other concerted activities" clearly and unambiguously includes joint litigation in court.

Section 7's catch-all phrase refers to "other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*." The reference to "mutual aid or protection" following the specified protected activities—"self-organization, to form, join, or assist labor organizations, to bargain collectively"—strongly indicates that protected "concerted activit[ies]" include only *self*-help measures to realize the participatory and substantive rights conferred by the NLRA. Certainly, "other mutual aid or protection" does not clearly and unambiguously encompass class actions in general, and particularly not class actions grounded in employees' individual claims under other statutes to obtain damages or other compensatory relief.

Indeed, Section 7's reference to concerted activities *cannot* have been intended to confer a right to engage in class actions, because the NLRA was en-

acted "prior to the advent in 1966 of modern class action practice." *D.R. Horton*, 737 F.3d at 362; see also *Iskanian*, 327 P.3d at 141. Simply put, Congress could not have intended to protect "a right of access to" "procedure[s] that did not exist when the NLRA was (re)enacted." *D.R. Horton*, 737 F.3d at 362.

This Court employed precisely that reasoning in *Italian Colors*. There, the Court held that the antitrust laws did not preclude arbitration provisions containing class-action waivers, in part because the Sherman and Clayton Acts "make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23." 133 S. Ct. at 2309.[4]

Critically, *Chevron* deference has no role to play in determining whether there has been a "contrary congressional command" sufficient to override the FAA. That is because the decision to displace the protections that Congress enacted in the FAA must be made *by Congress*. A statute that is silent or am-

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[4] Even if it were permissible to construe Section 7 to cover concerted litigation activity, "there is nothing inherently 'concerted' about the class action. * * * A single plaintiff can litigate a class action to completion without any intervention by or material support from any other class members." *NLRB* v. *Alternative Entm't, Inc.*, 2017 WL 2297620, at *16 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part); see also No. 16-307 Pet. App. 148a (NLRB Member Johnson, dissenting) (emphasis in original) ("an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees"). While a class action may affect the rights of absent class members, the Board has never held that sufficient to make an action "concerted" for Section 7 purposes outside this context. See *id.* at 148a-154a; see also *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 829 n.6 (1984).

biguous with respect to whether litigation is even included by definition does not satisfy that requirement.

The *Chevron* standard *would* be relevant to the separate question whether Section 7's reference to "other concerted activities" protects litigation activity that does not implicate arbitration agreements. Specifically, if Section 7's text does not unambiguously *exclude* litigation activities, then, under current precedent, at least, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). If the Board's determination that the provision applies to litigation activities is reasonable, the statute's protections would apply to efforts to limit joint litigation activity outside the context of an arbitration agreement.

There is nothing discordant about that result. State statutory and common-law rules barring predispute waivers of a consumer or employee's right to pursue class actions are fully enforceable if not contained in arbitration agreements. See, *e.g.*, *Am. Online, Inc.* v. *Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Ct. App. 2001) (invalidating forum-selection clause that had effect of precluding class actions); *Dix* v. *ICT Grp., Inc.*, 161 P.3d 1016, 1025 (Wash. 2007) (same). And, although we are not aware of a decision addressing the question, the Credit Repair Organizations Act's anti-waiver provision might be interpreted to have the same effect, even though the *CompuCredit* Court concluded that it was insufficient to displace the FAA.

But concluding that Section 7 may be ambiguous as to group litigation outside the arbitration context

is not sufficient to displace the FAA: Because the Court "resolve[s] doubts in favor of arbitration," if the parties' arguments are "in equipoise," this Court's "precedents require" that the agreement to arbitrate be enforced. *CompuCredit*, 565 U.S. at 109 (Sotomayor, J., joined by Kagan, J., concurring in the judgment).

Second, even proof that the text of the statute clearly and unambiguously encompasses class actions would not be sufficient by itself to satisfy the *CompuCredit* test. A party seeking to invalidate an arbitration provision must show a "contrary * * * command"—in other words, that the statutory text demonstrates not just Congress's intent to confer a particular right, but also Congress's intent to displace the otherwise-applicable FAA protection for arbitration agreements. That is why the *CompuCredit* Court used statutory provisions explicitly declaring specified arbitration agreements unenforceable to illustrate the "contrary congressional command" principle.

Nothing in Section 7 provides the slightest indication that Congress intended to limit the otherwise-applicable protections for arbitration agreements. There is no reference to arbitration at all, let alone an indication that Congress wished to preclude or limit the FAA's applicability in this context.

It would be particularly peculiar to conclude that Congress in the labor context intended to displace an essential attribute of arbitration protected by the FAA, given the long history of the use of arbitration to resolve labor-related disputes. See, *e.g.*, *Textile Workers Union of Am.* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 458 (1957) (noting the "congressional policy toward settlement of labor disputes by arbitration").

Indeed, "the first Supreme Court decisions defending arbitration as a method of dispute resolution involved labor disputes in which unions used arbitration over the objections of industrial employers." *Alternative Entm't*, 2017 WL 2297620, at *12 (Sutton, J., concurring in part and dissenting in part).

It is therefore especially appropriate in this context to require a clear expression in the statutory text before concluding that Congress was limiting the long-established principle that parties to arbitration agreements may "specify with whom [they] choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (emphasis, citation, and quotation marks omitted). There is no such statement in the NLRA.

The NLRB and other parties seeking to invalidate arbitration agreements assert that the NLRA bars advance waivers of Section 7 rights. But the statute before this Court in *CompuCredit* contained both an express reference to the filing of class actions *and* an anti-waiver provision, yet the Court found that text insufficient to show the requisite contrary congressional command. See pages 9-10, *supra*. A waiver provision without explicit text protecting joint litigation therefore falls short of what is required to demonstrate that Congress displaced the FAA.

B. The *D.R. Horton* Rule Is Not Justified By The "Effective Vindication" Exception.

This Court has said that even in the absence of a clear congressional command overriding the FAA, there may be circumstances in which arbitration agreements need not be enforced because they would "prevent the effective vindication of a federal statu-

tory right." *Italian Colors*, 133 S. Ct. at 2310 (quotation marks omitted). This exception to the FAA's enforceability mandate—which the Court has never invoked to invalidate an arbitration provision—"finds its origin in the desire to prevent prospective waiver of a party's *right to pursue* statutory remedies." *Ibid.* (quotation marks omitted); see also *Gilmer*, 500 U.S. at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." (alterations in original)).

Like the "congressional command" exception, the "effective vindication" exception is narrow. The Court's precedents address this exception only in the context of arguments that arbitration would, as a practical matter, prevent a claimant from pursuing a cause of action (or a remedy for that cause of action) conferred by a federal statute. Thus, this exception (1) would permit invalidation of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights"; and (2) might also "cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Italian Colors*, 133 S. Ct. at 2310-2311.

Neither of those circumstances is present here. There is no claim that the arbitration agreements at issue bar the assertion of the relevant claims under the FLSA. As in *CompuCredit*, the agreements to arbitrate must be enforced because they preserve "*the legal power to impose liability*" under the statutes creating the cause of action. 565 U.S. at 102. And there is no claim that fees associated with the arbitral forum present an obstacle to vindication of the claimed federal right.

Most important for present purposes, in *Italian Colors* the Court squarely held that class-action waivers in arbitration provisions do not prevent effective vindication of the antitrust laws, explaining: "The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." 133 S. Ct. at 2311.

That should be the end of any "effective vindication" inquiry.

The Board nonetheless argues for creation of a new category of "effective vindication" claim. It argues that Section 7 confers a "substantive right" to engage in concerted litigation, the vindication of which is prevented by agreement to arbitrate disputes on an individual basis.

But the "contrary congressional command" inquiry assesses the very same question: whether Congress so clearly expressed its intent to displace the FAA that the protections provided by that statute should not apply. There is no reason to allow a second bite at the very same apple—and to do so under a standard that does not inquire directly whether *Congress* has made a decision to displace the FAA.

If Congress in the NLRA had created an inalienable right to bring class actions, the "congressional command" exception would be satisfied, and there would be no need to extend the "effective vindication" exception to procedures like class actions. By the same token, because Congress did not clearly override the FAA by including class actions within the plain terms of Section 7, stretching the "effective vindication" exception to cover the *D.R. Horton* rule

would enable circumvention of the "congressional command" standard that this Court has crafted to ensure vindication of the statutory rights that Congress conferred in the FAA.

Even if, contrary to our submission, it were appropriate to expand the never-applied effective-vindication exception, that exception does not apply here. The NLRB would have to show that (a) Section 7 confers a "substantive right"; (b) Congress itself incorporated class actions within that right; and (c) bilateral arbitration prevents vindication of that right. The Board fails on each count.

First, the Board contends that the NLRA is "*sui generis*" (No. 16-307 Pet. App. 43a)—that, unlike other employment statutes that create a mere procedural right to participate in class or collective actions, the NLRA makes collective legal actions a "core substantive right" (*id.* at 40a). But there is no principled basis for distinguishing Congress's express authorization of class actions in the Credit Repair Organizations Act and the ADEA from the Board's reading of "other concerted activities" to include class actions.

Moreover, as this Court has explained, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) (noting that Rule 23 does not "abridge, enlarge or modify any substantive right" (quoting 28 U.S.C. § 2072(b))).

Nor is there any reason to conclude that collective legal action is any more a "core" part of the NLRA than it is a "core" part of any other statute:

The focus of the NLRA is organizing and collective bargaining, not litigation.

Both Congress and this Court regard Section 7 as a means to the end of better wages and working conditions (*i.e*, procedural), not as an end in itself (*i.e.*, substantive). When it enacted the NLRA, Congress explained that the purpose of the Act was to "encourag[e] * * * collective bargaining" and "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

And this Court likewise recognized that these rights "are protected *not for their own sake* but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (emphasis added) (quoting 29 U.S.C. § 151). The Court accordingly drew a distinction between "employees' *substantive* right to be free of racial discrimination" and "the *procedures* available under the NLRA for securing these rights." *Id.* at 69 (emphases added).

In short, insofar as anything turns on whether the right to engage in "other concerted activities" is procedural or substantive, both the statute and this Court treat it as procedural.

Second, Congress in the NLRA did not create a "right" to participate in class actions.

We have already explained that the plain language of Section 7 does not unambiguously encom-

pass class actions. See pages 11-12, *supra*. That should be the end of the inquiry. A federal agency may not supersede the clear command of one statute enacted by Congress (here, the FAA) based on the agency's construction of what is at best ambiguous language in a second statute (the NLRA). Only Congress has the power to make that determination.

If the Court decides that even an ambiguous statute can displace an unambiguous one, then the Court should determine Section 7's meaning for itself, without deferring to the NLRB. There is no basis for concluding that Congress would delegate such a decision to a federal agency. Cf. *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). The best reading of the statutory text is that Section 7 does not guarantee a right to class actions.

Third, even if Section 7 could be read to create a right to participate in class actions, it does not follow that an agreement that requires bilateral arbitration prevents the effective vindication of employees' Section 7 rights.

The "effective vindication" exception has never been read to require that every twig in a bundle of rights remain impregnable. Indeed, the Justices who dissented in *Italian Colors* recognized that the agreement involved in that case "could have prohibited class arbitration without offending the effective-vindication rule if it had provided an alternative mechanism" for coordination among claimants. 133 S. Ct. at 2318 (Kagan, J., dissenting). That is manifestly the case with employment arbitration.

Employees who sign agreements to arbitrate on an individual basis can still engage in myriad forms of concerted activity, including forming unions if

their workplace is not already unionized, raising grievances through their unions (or collectively in the absence of a union), striking, picketing, and collective bargaining.

And even within the realm of bilateral arbitration, employees are left free to communicate with co-workers about workplace problems, to encourage their co-workers to bring claims, to testify in each other's cases, to jointly retain the same counsel and expert witnesses, to share evidence, and to pool resources to fund litigation. Indeed, this kind of coordinated arbitration strategy should be easier in the employment context than elsewhere, because a group of employees with similar claims will be easier to identify and communicate with than a comparable group of consumers.

In short, the *only* thing restricted by agreements to arbitrate on an individual basis is employees' ability to litigate their claims collectively. Removing that one twig from the bundle does not prevent employees from vindicating their right under Section 7 to engage in "concerted activities" for their "mutual aid or protection."

Finally, if there truly is an irreconcilable conflict between the FAA and the NLRA (as interpreted by the Board), that does not mean that the FAA should give way.

The Court was presented with precisely that scenario in *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942). There, the owner of a vessel discharged several crew members who had engaged in a strike while aboard ship. The Board determined that in so doing the employer had violated various provisions of

the NLRA. The Board accordingly ordered the employees' reinstatement (among other remedies).

This Court agreed that ordinarily the Board's order would have been within its authority, but continued that "there is more to this case"—namely, that "[t]he strike was conducted by seamen on board a vessel and away from home port." 316 U.S. at 38. That rendered the strike an act of mutiny in violation of federal law. *Id.* at 38-46. In such circumstances, the Court explained, "the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.* at 47. Because there were other ways that the employees and the union could have sought redress under the NLRA besides engaging in a strike that amounted to mutiny, the Court overturned the Board's order. *Id.* at 47-49.

So too here. As noted above, employees may engage in a wide range of "concerted activities" "for the purposes" of "mutual aid or protection" other than participating in a class or collective action. Hence, the "careful accommodation of one statutory scheme to another" called for by *Southern Steamship* requires that the Board's interpretation of the NLRA, not the FAA, give way.

C. The *D.R. Horton* Rule Is Not Authorized By Section 2's Savings Clause.

The FAA itself contains an exception to its enforceability mandate, stating that arbitration agreements shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. This "savings clause" exception, too, is inapplicable here.

Like the "congressional command" and "effective vindication" exceptions, the savings clause is narrow. It allows "agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)); see *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law applies only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

Moreover, "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343.

The Court accordingly has held that an ostensibly neutral rule of California law that prohibited class-action waivers in any consumer agreement of adhesion did not fall within the savings clause because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

The Board nonetheless places principal reliance on the savings clause in its defense of the *D.R. Horton* rule. Indeed, the Board's question presented focuses exclusively on the savings clause. The Seventh Circuit in No. 16-285 and the Ninth Circuit in No.

16-300 likewise relied solely on the savings clause in upholding the *D.R. Horton* rule.

That approach is curious for several reasons.

To begin with, *none* of this Court's previous decisions addressing the interplay between the FAA and another federal statute has even mentioned the savings clause. Rather, the Court describes the savings clause as "the touchstone" for determining when "state law" is applicable—and not preempted by the federal-law enforceability command set forth in the first clause of Section 2. *Perry*, 482 U.S. at 492 n.9.

"Saving clauses save state laws from preemption; they don't save other federal statutes enacted by the same sovereign." *Alternative Entm't*, 2017 WL 2297620, at *18 (Sutton, J., concurring in part and dissenting in part) (citation omitted); accord, No. 16-300 Pet. App. 39a (Ikuta, J, dissenting).

Moreover, invoking the savings clause in this context carries the risk of diluting and circumventing the "contrary congressional command" test, which rests on the general principles that this Court applies in addressing claims that two federal statutes conflict. See pages 18-19, *supra*.

For these reasons, it is highly questionable whether the savings clause even applies when the other federal statute—here, the NLRA—is not sufficiently clear to satisfy the "congressional command" exception.

But even if it were theoretically possible for the savings clause to apply when the ostensibly neutral rule derives from a federal statute that does not itself clearly override the FAA, this Court's case law

establishes that the savings clause does not apply to rules directed at class-action waivers.

1. *Concepcion* establishes that the *D.R. Horton* rule does not fall within the savings clause.

The argument that the *D.R. Horton* rule falls within the savings clause rests on the following syllogism: (a) under the savings clause, arbitration agreements can be invalidated based on "such grounds as exist at law or in equity for the revocation of any contract"; (b) illegality is a generally applicable ground for invalidating contracts; (c) the NLRA (according to the Board) makes all agreements to resolve disputes on an individual basis illegal, because such agreements infringe upon employees' Section 7 right to engage in "concerted activity"; and therefore, (d) the NLRA's prohibition is covered by the savings clause. See No. 16-307 Pet. 13-14; No. 16-285 Pet. App. 14a-15a; No. 16-300 Pet. App. 17a.

As Judge Sutton recently explained, however, that line of reasoning "is a repackaging of arguments *Concepcion* already rejected." *Alternative Entm't*, 2017 WL 2297620, at *18 (Sutton, J., concurring in part and dissenting in part).

Concepcion addressed California's *Discover Bank* rule, under which class waivers in consumer contracts of adhesion—whether arbitration agreements or other contracts—were deemed to be unenforceable as illegal exculpatory clauses. See *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005). The respondents in *Concepcion* argued that Section 2's savings clause "expressly preserves state-law contract principles that do not discriminate against arbitration"; that "the principle that class action waiv-

ers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally"; and that "[t]he approach courts have taken to class-action bans in nonarbitration agreements * * * demonstrates that the California Supreme Court and other courts that have reached the same conclusion are concerned with aggregation, not arbitration." Resp. Br. at 13, 21, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *13, *21 (quoting *Discover Bank*, 113 P.3d at 1112).

That is the exact same syllogism that the Board invokes here—and this Court flatly rejected it. The Court explained that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. Observing that "[t]he overarching purpose of the FAA, evident in the text of [9 U.S.C.] §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344; see also *Italian Colors*, 133 S. Ct. at 2312 (in *Concepcion*, "we invalidated a law conditioning enforcement of arbitration on the availability of class procedure").

As Judge Sutton recently explained, "[s]ubstitute 'illegality' for 'unconscionability[]' [in *Concepcion*] and you have the Board's argument * * *. That did not work there. It should not work here." *Alternative*

Entm't, 2017 WL 2297620, at *18 (Sutton, J., concurring in part and dissenting in part). Because the *D.R. Horton* rule conditions enforcement of employment arbitration agreements on the availability of class procedures, it falls outside the savings clause for the same reason as the *Discover Bank* rule did.

2. The Board's efforts to distinguish *Concepcion* miss the mark.

The Board and the Seventh and Ninth Circuits attempt to distinguish *Concepcion* on various grounds, but none withstands scrutiny.

First, they argue that Section 7's protection of concerted activity does not "discriminate" against arbitration. That argument was made and rejected in *Concepcion*. The respondents in that case asserted that "[t]he state does not treat arbitration agreements in a manner different from that in which it otherwise construes nonarbitration agreements" and that "California's unconscionability doctrine incorporates the venerable prohibition on exculpatory clauses," which is "applicable to all contracts and codified in California's law since 1872." Resp. Br. at 18, 19, *Concepcion*, 2010 WL 4411292, at *18, *19 (quotation marks omitted).

This Court held that *facial* neutrality is insufficient, explaining that if a generally applicable contract defense is "applied in a fashion that disfavors arbitration" or otherwise "stand[s] as an obstacle to the accomplishment of the FAA's objectives," it falls outside the savings clause. *Concepcion*, 563 U.S. at 341, 343. Thus, as the California Supreme Court observed in holding that the *D.R. Horton* rule cannot be reconciled with the FAA, "*Concepcion* makes clear that even if a rule against class waivers applies

equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Iskanian*, 327 P.3d at 141.

Second, the Board and the Seventh and Ninth Circuits have argued that the *D.R. Horton* rule does not run aground on *Concepcion* because it leaves employers free to insist on bilateral arbitration so long as class procedures are available to employees in court. But the *Concepcion* respondents, too, pointed out that "California law is neutral as to whether classwide proceedings take place in arbitration or in court." Resp. Br. at 54, *Concepcion*, 2010 WL 4411292, at *54.

This Court held, however, that such a hybrid approach is precluded by the FAA because it would undermine the objectives of arbitration. Although consumers would "remain free to bring and resolve their disputes on a bilateral basis," there would be "little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." *Concepcion*, 563 U.S. at 347. Moreover, "faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Ibid.* That is as true in the employment context as it is in the consumer context. Whether by rules of the arbitration forum or by contract, virtually all employers wind up subsidizing employment arbitration by paying the lion's share of the fees.[5] That

[5] Epic Systems's and Murphy Oil's arbitration provisions require them to pay all arbitration costs other than the filing fee. No. 16-285 Pet. App. 33a; No. 16-307 J.A. 9. And while Ernst &

is economically justifiable if they receive in return the assurance that all claims will be arbitrated on an individual basis. But if they must confront class actions, there is no incentive to subsidize arbitration of individualized claims—claims that might not be brought at all if arbitration were unavailable.

Third, the Board and the Seventh and Ninth Circuits argue that *Concepcion* is distinguishable because it involved a state-law rule, whereas here the *D.R. Horton* rule rests on the Board's interpretation of a federal statute (the NLRA).

But assuming for present purposes that the savings clause applies at all to federal-law grounds for invalidating a contract, there certainly is no basis for going further and assuming that it gives *preferential* treatment to such federal-law grounds. To be sure, this Court held in *Concepcion* that "nothing in [Section 2's savings clause] suggests an intent to preserve *state-law* rules that stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at

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Young's arbitration provision requires costs to be shared equally "to the extent permitted by law and the [arbitration provider's] Arbitration Rules" (No. 16-300 J.A. 45), the provision also allows employees to choose from among three arbitration providers (*id.* at 41), two of which—the AAA and JAMS—require the employer to pay virtually all costs of the arbitration. See Am. Arbitration Ass'n, Employment Arbitration Rules and Mediation Procedures 33 (Nov. 1, 2009) ("AAA Rules"), https://www.adr.org/employment (limiting employee costs to $200); JAMS, JAMS Employment Arbitration Rules & Procedures (2014), https://www.jamsadr.com/rules-employment-arbitration/ (specifying that when arbitration agreement is a condition of employment, the employee pays only the initial case management fee). Thus, as a practical matter Ernst & Young will wind up subsidizing arbitration just as if it agreed to do so in its arbitration provision.

343 (emphasis added). But it made clear in *Italian Colors* that the same principle applies to federal-law rules, explaining: "Truth to tell, our decision in [*Concepcion*] all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law 'interfere[d] with fundamental attributes of arbitration.'" 133 S. Ct. at 2312 (alteration in original) (quoting *Concepcion*, 563 U.S. at 344).

Most importantly, if the Board were correct that the savings clause covers the *D.R. Horton* rule, a state statute purporting to guarantee individuals the right to "concerted action" would also fall within the savings clause. Yet that is exactly what California courts attempted to do in *Discover Bank*—and what *Concepcion* held the FAA forbids. Accordingly, "in light of *Concepcion*," such a reading of the NLRA "is not covered by the FAA's savings clause." *Iskanian*, 327 P.3d at 141.

That the *D.R. Horton* rule is the creation of a federal agency *is* relevant, but not to the savings clause. Rather, it brings into play the question whether, in enacting the NLRA, Congress displaced the FAA. As we have explained (see pages 6-16, *supra*), there is no credible argument that Congress did so.

* * *

In sum, none of the three exceptions to the FAA's enforceability mandate is applicable here. The Board's *D.R. Horton* rule must therefore be invalidated, and the arbitration agreements in these cases enforced according to their terms.

II. BILATERAL ARBITRATION IS BENEFICIAL TO EMPLOYERS AND EMPLOYEES ALIKE

The Court's decision in this case turns upon statutory text, not policy arguments. But opponents of arbitration consistently assert that arbitration disadvantages employees. These policy arguments provide no basis for disregarding Congress's decision to codify in law a federal policy favoring arbitration. But they are also wrong: Bilateral arbitration provides significant benefits to employers *and* employees alike.

For many employees with individualized complaints against their employer—whether involving wrongful discharge, unlawful discrimination, or other grievances—arbitration is the *only* viable means of recovery, because the employees' claims are too small to justify the expense of court litigation or to attract a contingency-fee lawyer.

This Court has recognized that "[a]rbitration agreements allow parties to avoid the costs of litigation, *a benefit that may be of particular importance in employment litigation*, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001) (emphasis added); see also *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) ("[A]rbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation.").

Empirical analyses bear out this Court's assessment. A leading study of employment arbitration in 2003 concluded that employees whose income or legal claim was less than $60,000 would not be able

to afford litigation but would be able to proceed in arbitration. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (May-July 2003).[6] A small claim is more viable in arbitration because costs in arbitration are lower—and because in an arbitral forum, "it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 15 (2017).

In short, the empirical evidence shows that "a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist." *Id.* at 16.

Moreover, the arbitral forum is just as fair to employees as litigation in court. As one commentator explains, "most employment arbitration cases are today conducted under rules like those of the American Arbitration Association, which mandate a fair procedure." Laura J. Cooper, *Employment Arbitration 2011: A Realist's View*, 87 Ind. L.J. 317, 320 (2012).[7]

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[6] The figure is likely higher today: $60,000 in 2003 equates to nearly $80,000 in 2017. See Bureau of Labor Statistics, *CPI Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl.

[7] Arbitration agreements that include unfair procedural rules, or unfair processes for selecting arbitrators, are subject to invalidation under generally applicable unconscionability principles. *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533-534 (2012); see also, *e.g.*, *Chavarria* v. *Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013) (provision requiring employee

Specifically, the AAA's employment-arbitration rules (1) cap an employee's filing fee in a case against an employer at $200 and require the employer to pay the other costs and expenses of arbitration; (2) provide that arbitrators must be mutually acceptable to both parties; (3) require arbitrators to disclose any circumstance that might raise doubt about their impartiality; and (4) ensure both sides "discovery * * * necessary to a full and fair exploration of the issues in dispute." See generally AAA Rules.

As a consequence, "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (2005); see also, *e.g.*, St. Antoine, *supra*, at 16 (endorsing this conclusion).

For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *ibid.* (comparing median awards).

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to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Alexander* v. *Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (provision barring punitive damages).

Because of both its informality and its efficiency, arbitration is also less contentious than litigation, enabling employees to resolve disputes with less risk of permanently damaging their relationships with their employers and coworkers. And because one of the hallmarks of employment arbitration is confidentiality, this alternative-dispute-resolution mechanism reduces the risk that potentially embarrassing information about an employee will become public—including even the very fact that the employee pursued a claim against the employer, which may benefit the employee if he or she applies for a job at another employer in the future.

If the Board's arguments were accepted and the *D.R. Horton* rule upheld, all the benefits of bilateral arbitration would be lost. Employees, employers, and the national economy would all be worse off; and the many employment disputes that are routinely and effectively arbitrated every day would be diverted to an already-clogged court system—the very scenario that the FAA was designed to prevent.

CONCLUSION

The judgment of the court of appeals in No. 16-307 should be affirmed. The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be reversed.

Respectfully submitted.

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